Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES R. ROBINSON IV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether relevant conduct must be proven by a reasonable doubt in light of the recent United States Supreme Court decision in *United States v. Apprendi*, 120 S. Ct. 2348 (2000).

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CITATIONS TO OPINIONS AND ORDERS ENTERED IN THIS CASE

The following citations to the opinions and orders entered in this case will be recited in reverse chronological order.

The opinion of the United States Court of Appeals for the Seventh Circuit upon which this petition is seeking review is reported in a table at *United States v. Robinson*, 215 F.3d 1331 (7th Cir. 2000). The opinion can be accessed via Westlaw at 2000 WL 689182 (7th Cir., May 23, 2000) and is reprinted in the appendix attached hereto. The order entered by the District Court in the Central District of Illinois is reported at *United States v. Robinson*, 76 F. Supp. 2d 941 (C.D. Ill. 1999) and is reprinted in the appendix attached hereto.

The United States Supreme Court denial of rehearing is reported at *United States v. Robinson*, 120 S. Ct. 628, 145 L. Ed. 2d 519, 68 USLW 3390 (1999).[1] The United States Supreme Court denial of Petition for Writ of Certiorari is reported at *United States v. Robinson*, 120 S. Ct. 122, 145 L. Ed. 2d 104, 68 USLW 3225 (1999).

The first opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States v. Robinson*, 164 F.3d 1068 (7th Cir. 1999) and is reprinted in the appendix attached hereto. The first order entered by the District Court in the Central District of Illinois in *United States v. Robinson* is not published and is reprinted in the appendix attached hereto.

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1. The defendant, pro se, filed two petitions to the United States Supreme Court requesting that the District Court Judge be recused from his case on remand.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 23, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. §§ 841(a) and (b) reprinted in the appendix attached hereto.

STATEMENT OF THE CASE

This petition presents the issue of whether a defendant's constitutional rights are violated when a judge determines a defendant's drug quantity and other relevant conduct at sentencing by proof of preponderance of the evidence. The Supreme Court of the United States recently held that

any factor which increases his sentence beyond the statutory maximum must be proved beyond a reasonable doubt to the jury. *United States v. Apprendi*, 120 S. Ct. 2348 (2000). The ruling in *Apprendi* should be extrapolated to require drug quantities and other relevant conduct attributable to a defendant to be proved beyond a reasonable doubt at the sentencing stage.

This issue arises in the context of a federal criminal case in which the defendant, Charles Robinson IV, was sentenced to 100 years in prison. The defendant was charged on a three count indictment. The first count alleged the defendant violated 21 U.S.C. § 841(a)(1) for possessing with the intent to distribute 16.8 grams of cocaine base ("crack") and 27.7 grams of cocaine. The second count alleged that the defendant violated 21 U.S.C. § 841(a)(1) for distributing 2.1 grams of cocaine base ("crack"). The third count alleged that defendant violated 21 U.S.C. § 841(a)(1) for possessing with intent to distribute 14 grams of cocaine base ("crack"). On December 4, 1997, a jury found the defendant guilty beyond a reasonable doubt on all three counts.

The Sentencing Proceedings Below

On June 2, 1998, the district court for the Central District of Illinois sentenced the defendant to 100 years imprisonment. In sentencing the defendant, the court relied upon the evidence at trial and the information included in the presentence report. The court found that the evidence elicited at trial consisted of 27.6 grams of powder cocaine and 32.9 grams of "crack". However, the court attributed an additional 5,213.7 grams of "crack" to the defendant based upon relevant conduct in accordance with U.S.S.G. § 1B1.3. As result, the defendant was penalized on count 1 for violating

21 U.S.C. § 841(b)(1)(B) which has a statutory maximum sentence of 40 years, for count 2 he was penalized for violated 21 U.S.C. § 841(b)(1)(C) which has a maximum sentence of 20 years, and on count 3 he was penalized for violating 21 U.S.C. § 841(b)(1)(B) which has a statutory maximum sentence of 40 years. After finding the defendant's base offense level and adding in enhancements, the defendant had an adjusted offense level of 43 and a criminal history category of VI, yielding a sentencing range of life imprisonment. However, since a defendant's sentence can not be greater than the statutory maximum sentence, he was sentenced to the maximum amount of one hundred years of imprisonment.

Defendant appealed the district court's ruling of relevant conduct to the Seventh Circuit Court of Appeals.[2] The defendant argued that the relevant conduct attributed to him at the sentencing was not relevant to his offense of conviction pursuant to U.S.S.G. § 1B1.3. The Seventh Circuit Court of Appeals vacated and remanded the sentence for further proceedings. In so holding, the court stated that while a judge is not required to hear personally from a witness, it believes that it is "not a terribly bad idea" to do so when one witness is providing 97% of the relevant conduct.

On remand, the District Court for the Central District of Illinois again sentenced the defendant to 100 years of imprisonment. Following the Appellate Court's remand instructions, the district court heard testimony from witnesses and again held the defendant accountable for over 500 grams of "crack". As result, the defendant was again sentenced for two counts in violation of 21 U.S.C. § 841(b)(1)(B) and one count of violating 21 U.S.C. § 841(b)(1)(C).

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2. The defendant raised other issues on his first appeal, but this petition does not raise any of those issues.

Defendant again appealed the district court's ruling regarding the relevant conduct to the Seventh Circuit Court of Appeals.[3] In his second appeal, the defendant argued that the conduct attributed to him was not relevant conduct pursuant to U.S.S.G. § 1B1.3 as it was not part of the same scheme or plan. This time, the Court of Appeals affirmed the defendant's 100 year sentence. The court found that the relevant conduct calculations by the district court were based upon trial evidence and by witnesses at the sentencing hearing.

The basis for federal court jurisdiction in this case is pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

Introduction

This case involves an issue which implicates important constitutional protections that are deeply rooted in this country's history. Namely, a defendant's Sixth Amendment right to be informed of the nature and cause of the accusations against him.

Prior to the United States Supreme Court decision in *United States v. Apprendi*, every United States court of appeals had concluded that a judge, not the jury, determines the amount of drugs involved in an offense. *See, e.g., United States v. McHugh*, 769 F.2d 860, 867 (1st Cir. 1985); *United States v. Campuzano*, 905 F.2d 677, 679 (2d Cir. 1990); *United States v. Gibbs*, 813 F.2d 596, 599 (3d Cir. 1987);

3. Defendant raised other issues on appeal, but the petition does not raise any of those issues.

United States v. Powell, 886 F.2d 81, 85 (4th Cir. 1989); *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States v. Moreno*, 899 F.2d 465, 472 (6th Cir. 1990); *United States v. Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989); *United States v. Wood*, 834 F.2d 1382, 1388 (8th Cir. 1987); *United States v. Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991); *United States v. Jenkins*, 866 F.2d 331, 334 (10th Cir. 1989); *United States v. Cross*, 916 F.2d 622, 623 (11th Cir. 1990) (per curiam); *United States v. Patrick*, 959 F.2d 991, 995 (D.C. Cir. 1992). Therefore the defendant had no constitutional right to a jury determination of the drug quantity.

The recent decision of the Supreme Court in *United States v. Apprendi* focused on elements that increase a defendant's statutory maximum. In the case at bar, the defendant's statutory maximum is not being increased, however the amount of relevant conduct he is being attributed with dramatically increases his sentence and was not alleged in the indictment

I.

This petition should be granted to define the parameters upon which *United States v. Apprendi* should apply to the sentencing guidelines, specifically relevant conduct, which increase a defendant's sentence.

On June 26, 2000, this court authored an opinion holding that any fact which increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *United States v. Apprendi*, 120 S. Ct. 2348 (June 26, 2000). In *Apprendi*, this court focused on a criminal defendant's constitutional safeguard,

"to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.*

The Federal Sentencing Guidelines have previously been upheld by this court as being constitutional. *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647 (1989). However, with the advent of *United States v. Apprendi*, this court must take a closer look at the guidelines, specifically the impact of relevant conduct on a defendant's sentence.

The Seventh Circuit has already recognized that the guidelines give the government a "fearsome tool in drug cases". *United States v. Duarte*, 950 F.2d 1255 (7th Cir. 1991). This fearsome tool is based upon the guidelines giving prosecutors a vehicle by which they can charge a defendant with a minimal amount of drugs and then at sentencing introduce evidence of more serious crimes by only a showing of preponderance of the evidence and escalate his sentence by a number of years. *United States v. Duarte*, 950 F.2d 1255, 1263 (7th Cir. 1991). The court in *Duarte* recognized this tactic:

> This advantage derives from the arbitrage-like quality of criminal trials — prosecutors must prove beyond a reasonable doubt all elements of the crimes charged in the indictment, but, once having garnered a conviction, need only prove by a preponderance of the evidence facts alleged at sentencing. *Id.*

The government can indict a defendant for possessing or distributing a controlled substance without alleging the type of drug or the quantity. Then at sentencing, prove the type

and quantity that was possessed or distributed by only a preponderance of the evidence. The drug amounts are attributed to the defendant through relevant conduct as proscribed in the sentencing guidelines. U.S.S.G. § 1B1.3(a)(2) In addition, the government can add in other conduct which is considered relevant to the offense of conviction. According to the guidelines, conduct is relevant "if it is part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). The prosecutor need only prove by a preponderance of the evidence that the conduct is relevant.

The Supreme Court in *Apprendi* held that a where defendant faces punishment beyond the statutory maximum all facts related to that sentence must be proved by a reasonable doubt. The sentencing guidelines, namely relevant conduct, must be looked at in light of this recent Supreme Court decision. Justice Thomas in his concurring opinion discussed in depth the historical basis for determining whether a factor is an element of the offense. Justice Thomas condensed his historical overview into one sentence, quoting J. Bishop, "The Indictment must allege whatever is in law essential to the punishment sought to be inflicted." Justice Thomas went on to quote Bishop as saying, "persons held for crimes . . . shall be convicted, there shall be an allegation made against them of every element of crime which the law makes essential to the punishment to be inflicted." *Apprendi* at 2374 quoting 1 Bishop, Criminal Procedure § 88 at 56. Justice Thomas predicted that the sentencing guidelines would become questionable after the publication of *Apprendi* and reserved that question for another day. The day has come.

The defendant in the case at bar was indicted for possession with intent to distribute a 60.6 grams of cocaine

base crack. The defendant was on notice that he was being indicted for this amount of drugs. The jury found the defendant guilty on all three counts of the indictment. However at sentencing, the government introduced a plethora of evidence indicating that he also possessed a firearm, controlled others, and, during the first sentencing, was involved with 5,246.6 grams of cocaine base. This tactic is in complete disregard for a defendant's constitutional right of knowing the accusations made against him.

The government's tactics, made available to them by the sentencing guidelines, questions the validity of the offenses that are introduced at sentencing. The government is given the opportunity to pick and choose which offenses he is going to charge to the defendant. If he believes that he will not be able to prove certain charges beyond a reasonable doubt, then he can save that artillery until the sentencing stage and only be required to prove it by a preponderance of the evidence. In the instant case, the defendant was not charged with conspiracy or possession of a firearm. Yet, during sentencing, with proof by a preponderance of the evidence, the defendant was sentenced for controlling others and possession a firearm.

This court in *Apprendi* reviewed the historical background of a defendant knowing what he is charged with before the trial. Specifically, the court cited to J. Archbold:

> all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defense accordingly . . . and that there may be no doubt

> as to the judgment which should be given if the defendant be convicted. J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862).

A defendant's relevant conduct should be held to the same standard of proof as that at trial. The holding of *Apprendi* along with a defendant's constitutional rights should afford him the ability of knowing exactly what he is going to be sentenced with. As the sentencing guidelines read now, the only protection the defendant has is knowing what offense he is being charged with that will ultimately open the door for the prosecutors at sentencing. The defendant in the case at bar did not even know all the witnesses that would be testifying against him until the day of the sentencing. There was absolutely no time for the defendant to prepare a defense as described by J. Archbold.

Along the same reasoning, the determination of whether a substance is cocaine base "crack" or powder cocaine should be a decision left for the jury to decided, not the judge. In the instant case, the defendant was found guilty on two counts of possessing with intent to distribute cocaine base "crack". Cocaine base and crack cocaine are not identical for Sentencing Guideline purposes. *United States v. Earnest*, 185 F.3d 808, 811 (7th Cir. 1999). In essence, crack cocaine is cocaine base, but cocaine base is not necessarily crack cocaine. *United States v. Adams*, 125 F.3d 586, 593 (7th Cir. 1997).

At the sentencing stage, the reports that were introduced, indicate only "cocaine" or "cocaine(present at base)". The guidelines amendment in 1993 made it clear that there should be an enhancement only if the substance is crack cocaine. The reports that state "Cocaine(present at base)" does not

lend any support to the government's burden of proving that the substance was crack cocaine.

A jury should decide the type of drug that is attributable to the defendant. The difference between sentencing a defendant on cocaine and sentencing him on crack makes a dramatic difference in his sentence. As a result, the jury should decide beyond a reasonable doubt the type of drug that will attributed to the defendant.

The recent holding in *Apprendi* has begun define a defendant's Sixth Amendment rights. The decision must extend to relevant conduct in order for the defendant's Sixth Amendment rights to be fully complied with.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the question presented by this Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MAY 23, 2000

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 16, 2000[1]
Decided May 23, 2000

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Terrence T. Evans, *Circuit Judge*

No. 99-4071

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES R. ROBINSON IV,

Defendant-Appellant.

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1. After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a); Cir. R. 34(f).

Appendix A

Appeal from the United States District Court
for the Central District of Illinois.

No. 97-30025

Richard Mills, Judge.

ORDER

In this successive appeal, Charles R. Robinson IV objects to the 100-year sentence reimposed on him, under the United States Sentencing Guidelines, for distribution of crack cocaine. Previously, in his direct appeal, we affirmed Robinson's conviction but vacated the sentence on the ground that the calculation of his "relevant conduct," that is, that Robinson distributed at least 500 grams of crack (*see* U.S.S.G. § 2D1.1(c)), relied too heavily on the information provided by a Gina Loonsfoot, information which was presented only through the presentence report. Loonsfoot did not testify, yet information she provided accounted for 97 percent of the drug quantity on which Robinson's hefty sentence was based. Under circumstances in which evidence of such importance was found exclusively in the presentence report, we required resentencing so that the calculation of relevant conduct could be based on information with greater "indicia of reliability." *United States v. Robinson*, 164 F.3d 1068, 1071 (7th Cir. 1999).

And now we have it. The relevant conduct calculations at resentencing are based on trial evidence and testimony by witnesses at the sentencing proceeding. Our review is for clear error. *United States v. House*, 110 F.3d 1281 (7th Cir. 1997).

Appendix A

As at the original sentencing procedure, at resentencing the district court properly relied on trial evidence and found that the amounts alleged in the indictment should be included in the calculation of the amount of drugs involved in Robinson's offense for the ultimate determination of his offense level. Those amounts are 27.6 grams of powder cocaine and 32.9 grams of crack.[2] If the judge had stopped here, Robinson would find himself at base offense level 28 with a far, far shorter sentence than he finds himself serving. But based on trial testimony, the district judge found that Robinson should also be held accountable for the 56.7 grams of crack attributed to him by David Alton and the 54 grams attributed to him by Michael Smith, for a total of 143.6 grams of crack, which, again if the court had stopped here, would put Robinson at base offense level 34. But 143.6 grams of crack is 356.4 grams short of the 500 grams on which Robinson was, in fact, resentenced. It was the distribution of 500 grams of crack that landed Robinson at base offense level 36. If the calculation of the base offense level is to stand, there must be evidence that Robinson distributed over 350 additional grams of crack, beyond that gleaned from the trial testimony. At the first sentencing it was Loonsfoot whose statements, taken from police reports and set out in the presentence report, provided the evidentiary basis for the additional crack. As we said in our 1999 opinion, reliance on what the presentence said that Loonsfoot had said gave us pause. This time there is a stronger evidentiary basis for

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2. Because the 27.6 grams of powder cocaine are not necessary to the final calculation, we will, as we did in the first appeal, ignore the powder cocaine to avoid the necessity of using the Drug Equivalency Charts from the sentencing guidelines. *See Robinson*, at 1070.

the findings. Three live witnesses put Robinson's distribution far over 500 grams. Loonsfoot, by the way, is not among them, as her testimony was unavailable at the time of resentencing.

All three of the witnesses testified at the sentencing hearing. Despite Robinson's contention that the three were not testifying about conduct which could be considered relevant, we find that all three testified as to conduct which is, in fact, clearly relevant. The testimony went to the same conduct as that alleged in the indictment — distribution of crack cocaine. The testimony involved events which occurred on a regular basis, close in time to the charged conduct. *See United States v. Bacallao*, 149 F.3d 717 (7th Cir. 1998).

Robinson's girl friend, Stephanie Whitehead, testified that from June 1996 until December 1996, Robinson received cocaine from Tory Clay and Scott Allen and that he then converted it into crack, approximately 75 percent of which he sold. She testified that during that time, Robinson distributed approximately 5,103 grams of crack. Clay and Allen corroborated Whitehead's testimony. Clay[3] testified that from January 1995 until July 1996 he supplied Robinson with between 6 and 8 kilograms of powder cocaine, which Robinson cooked into crack; that would amount to about 4,500 grams of crack. Allen testified that he supplied Robinson with over 660 grams of cocaine between July 1996 and November 1996, which Robinson converted into crack. If he sold 75 percent of the crack, as Whitehead estimated,

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3. Robinson claims that Clay's testimony should have been excluded. We reject that claim for the reasons expressed by Judge Mills in his opinion (see p. 14 n.8).

he would have sold 499.67 grams of crack, based on Allen's testimony. The court specifically found the witnesses credible; their testimony shows distribution of crack far in excess of 500 grams.

Robinson objects, however, to the use of the testimony of these three persons and contends that our remand required that Loonsfoot should have been the only person allowed to testify: We reject that contention. The point of the resentencing hearing was to arrive at a reliable calculation of Robinson's conduct; we were concerned only that the evidence have indicia of reliability, not that it be from any particular source.

As we have indicated, the calculations put Robinson at base offense level 36 because his relevant conduct involved at least 500 grams of crack. U.S.S.G. § 2D1.1(c)(2). He then received 8 levels of enhancements, for a final adjusted offense level of 43. As a career offender, he was in criminal history category VI. For such an offender, the guidelines require a mandatory life sentence. However, the statutory maximums for Robinson's offense are 40 years on two of the counts and 20 on the other. In that situation, pursuant to U.S.S.G. § 5G1.2(d), the maximum sentences were properly imposed to run consecutively, which is how the judge arrived at a sentence of 100 years. We see no clear error in these calculations.

Even though he wants to limit evidence regarding relevant conduct to that which Loonsfoot could provide, Robinson nevertheless argues that all other aspects of the sentencing should have been reconsidered following the

remand. We disagree. The calculation of relevant conduct was the problem we perceived in the original sentencing procedure. The case was remanded for a "new and more critical look at Robinson's relevant conduct . . . ." At 1071. In short, we issued a limited remand as authorized by 28 U.S.C. § 2106. *See United States v. Parker*, 101 F.3d 527 (7th Cir. 1996). Accordingly, at the resentencing proceeding the district court properly refused to reconsider issues involving the enhancements for Robinson's role in the offense and for the possession of a firearm as well as the identity of the drug as crack cocaine rather than some other form of cocaine. Perceiving no error in the proceedings, we AFFIRM the sentence imposed on Charles Robinson IV.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION DATED AND FILED DECEMBER 7, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 97-30025

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES R. ROBINSON, IV,

Defendant.

OPINION

RICHARD MILLS,-U.S. District Judge:

Although a sentence of 100 years is very high, it is the sentence which Robinson, through his criminal activity, has earned.

It is the sentence for which the Sentencing Guidelines provide.

And, it is the sentence which this Court must reimpose.

Appendix B

I. PRELIMINARY ISSUES

This matter is before the Court following Charles R. Robinson, IV's, re-sentencing hearing. Before the Court could re-sentence Robinson, however, it had to resolve a few preliminary matters.

First, prior to the hearing, Robinson's counsel moved to withdraw his representation of Robinson. In his motion, Robinson's counsel represented that Robinson had asked him to file a motion to withdraw his representation based upon their inability to communicate and the current lack of trust between the two.

However, at the hearing, Robinson's counsel moved to withdraw his motion to withdraw his representation. Robinson's counsel informed the Court that Robinson's differences with him had been resolved and that Robinson wanted him to remain as his counsel during the re-sentencing hearing. Upon direct inquiry from the Court, Robinson confirmed that he wanted his current counsel to continue to represent him and his interests at the re-sentencing hearing. Accordingly, the Court allowed Robinson's counsel's motion to withdraw his motion to withdraw his representation of Robinson.

Second, on October 28, 1999, the Court received a courtesy copy of a pleading entitled "Petition for Extraordinary Writ" which Robinson, acting *pro se*, filed with the United States Supreme Court. In essence, Robinson asked the Supreme Court to issue a writ of mandamus instructing this Court to recuse itself and to transfer his

re-sentencing hearing to another district judge. Robinson has previously filed motions with this Court asking it to recuse itself, and the Court has denied those requests because the Court is not actually biased against him and because the Court's impartiality cannot reasonably be questioned in this matter. 28 U.S.C. § 144 & § 455(a). Robinson has also previously asked the United States Court of Appeals for the Seventh Circuit to issue a writ of mandamus disqualifying this Court from conducting his re-sentencing hearing, but the Seventh Circuit has denied his request. Because the Court has not received any instruction from a higher court to the contrary, the Court proceeded with Robinson's re-sentencing hearing.

Third, both Robinson, acting *pro se*, and his attorney, acting on his behalf, asked the Court to revisit all of the issues surrounding his original sentence. Specifically, Robinson and his counsel asked the Court to find that he does not qualify as a career criminal, that he should not receive a two level enhancement for possessing a firearm in relation to his drug dealing, that he should not receive a four level enhancement for being an organizer/leader, and that the Court should sentence him for possessing and distributing powder cocaine rather than crack cocaine. Robinson argued that this Court has the authority to reconsider all of these issues on remand because the reversal of his sentence unbundled his sentencing package, allowing the Court to consider these issues anew.

The Court disagrees. Contrary to Robinson's assertions, the Seventh Circuit's remand to this Court was limited to the issue of relevant conduct. Robinson relies upon the view of the majority of the circuits which hold that unless the

remand specifically limits a district court's inquiry, the district court can review sentencing matters *de novo*. *United States v. Caterino*, 29 F.3d 1390, 1394-95 (9th Cir. 1994); *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992); *United States v. Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996); *United States v. Sanchez Solis*, 882 F.2d 693, 699 (2nd Cir. 1989); *United States v. Campbell*, 168 F.3d 263, 265-66 (6th Cir. 1999).

However, the Seventh Circuit has adopted the minority view.[1] In this circuit,

> the scope of the remand is determined not by formula, but by inference from the opinion as a whole. If the opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error. A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal because the remand did not affect it.

United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996), citing *United States v. Polland*, 56 F.3d 776, 779 (7th Cir. 1995). The Seventh Circuit has adopted this position because, in its view, a *de novo* review at re-sentencing gives the

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1. The minority view has also been adopted by the Fifth, First, and D.C. Circuit Courts. *E.g.*, *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998); *United States v. Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997); *United States v. Ticchiarelli*, 171 F.3d 24, 32 (1st Cir. 1999).

defendant an unwarranted second bite at the apple, is prohibited by the law of the case doctrine, is implied by the limited nature of every remand, avoids multiple appeals, and avoids unnecessarily prolonging a case. *Id.* The Seventh Circuit's view is, of course, binding upon this Court.

In deciding Robinson's appeal, the Seventh Circuit opined that "even viewed deferentially, . . . the Loonsfoot statements fail to establish the kind of 'indicia of reliability' upon which a sentencing judge could comfortably rely. For that reason, *we think a new and more critical look at Robinson's relevant conduct is required.*" *United States v. Robinson*, 164 F.3d 1068, 1071 (7th Cir. 1999) (emphasis added). As such, the Court finds that its inquiry at re-sentencing is limited to a reconsideration of Robinson's relevant conduct, *i.e.*, the drug amounts for which he should be held accountable. All other issues raised by Robinson in his *pro se* commentary and by his counsel are outside the scope of the Seventh Circuit's remand, and therefore, this Court lacks the authority to consider them.

Furthermore, the law of the case doctrine prohibits this Court from reconsidering issues other than Robinson's relevant conduct at his re-sentencing hearing. This Court considered and rejected most of Robinson's objections at his initial sentencing hearing. In addition, the Seventh Circuit opined that the issues raised on appeal by Robinson other than his relevant conduct issue were meritless: "[h]aving reviewed the record, we conclude that . . . the sentencing judge did not err in invoking the gun or role-in-the-offense enhancements. Finally, the testimony at trial clearly established that Robinson distributed crack, not some less

devastating species of cocaine." *Robinson*, 164 F.3d at 1071 n. 1.

Accordingly, based upon the Seventh Circuit's finding that Robinson's claims are meritless, the law of the case doctrine prohibits this Court from revisiting Robinson's renewed objections to the Presentence Investigation Report ("PSR").[2] *See Polland*, 56 F.3d at 779 n. 1 (holding that "[w]e held, however, that of his many contentions, only some merited discussion. Though unstated, logic compels that our statement had but one conclusion: the other arguments were meritless. Similar language has been considered to constitute a decision on the merits for purposes of the law of the case doctrine."); *see also United States v. Minicone*, 26 F.3d 297, 299-300 (2nd Cir. 1994) (holding that the appellate court's statement that "[w]e hold that [defendant's] claims, including, among others, that he was a minor or minimal participant in the crimes charged, are without merit," without further discussion, precluded the district court from revisiting those issues).

Fourth, prior to the start of the re-sentencing hearing, Robinson asked the Court to prohibit the Government's witnesses from testifying. Robinson argued that the Seventh Circuit had anticipated that the Court would hear testimony from Gina Loonsfoot and from her alone. Robinson asserted that the Government was attempting to establish the drug amounts in the PSR through "backdoor" witnesses not

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2. Even if the Court were to reconsider the issues which Robinson and his counsel have raised anew, the Court would echo the Seventh Circuit's footnote in which that court stated that his objections were meritless. *Robinson*, 164 F.3d at 1071 n.1.

previously considered or relied upon by the United States Probation Office in compiling the PSR. Accordingly, Robinson asked the Court to exclude all witnesses other that Loonsfoot from testifying at the re-sentencing hearing.

However, the Court believes that the Seventh Circuit contemplated that, on remand, the Government may call witnesses other than Loonsfoot in order to support the PSR's findings. *See Robinson*, 164 F.3d at 1070 (noting that "[w]hile it's not required that a judge hear personally from *witnesses* under oath at a sentencing hearing about drug quantities, we think it's not a terribly bad idea to do so when the witness is going to provide the basis for, as here, 97 percent of a defendant's relevant conduct.") (emphasis added). The Government represented to the Court that although it attempted to locate Loonsfoot in order to have her testify at the hearing, it was unsuccessful. The Court finds nothing improper about having Robinson's girlfriend[3] and his drug suppliers[4] testify at the hearing in order to establish the amount of drugs for which he should be held accountable, and thus, his motion to excluded all witnesses other than Loonsfoot was denied.

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3. Contrary to his assertion, the PSR and the reports upon which the PSR relied did reference Robinson's girlfriend, Stephanie Whitehead.

4. The Government represented to the Court that although the PSR did not rely upon Tory Clay's (a/k/a "T Money") or Scott Allen's statements, it had previously disclosed those individuals to Robinson.

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II. RELEVANT CONDUCT

Therefore, the only issue for the Court to resolve on remand was the drug amounts for which Robinson should be held accountable based upon his convictions and his relevant conduct. U.S.S.G. § 1B1.3. As the Seventh Circuit noted, however, the best that Robinson could hope for is to receive a base offense level of 34, with a final adjusted offense level of 42. *Robinson*, 164 F.3d at 1071. In order to receive a base offense level of 34, the Court would have to find that Robinson dealt with less than 500 grams of crack. If the Court were to make such a finding, then Robinson's sentencing guideline range would be 360 months to life imprisonment. On the other hand, if the Court were to find that Robinson dealt with at least 500 grams of crack, then his sentencing guideline range would be mandatory life.[5]

The Court found that Robinson had dealt with at least 500 grams of crack cocaine. The Court based this conclusion upon the testimony of the witnesses who testified at trial, the law enforcement reports which were presented to the

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5. Any finding by the Court that Robinson dealt with at least 500 grams of crack would result in a sentencing guideline range of mandatory life. Robinson has a criminal history category of VI because he is a career offender. U.S.S.G. § 4B1.1. Because he has eight levels of enhancements which must be added to his base offense level, *Robinson*, 164 F.3d at 1071 n. 1., it becomes irrelevant whether his base offense level is 36 (at least 500 grams but less than 1.5 kilograms of crack) or 38 (1.5 kilograms or more of crack) because the highest adjusted offense level which a defendant can receive is 43. U.S.S.G. Chapter 5, Part A, comment, n. 2. A defendant with an adjusted offense level of 43 and a criminal history category of VI has a sentencing guideline range of mandatory life.

Court at the first sentencing hearing, and the testimony at the re-sentencing hearing presented by Stephanie Whitehead, Tory Clay (a/k/a "T Money"), and Scott Allen.[6]

During the trial, the Government presented evidence that Robinson possessed 32.9 grams of crack on his three counts of conviction (2.1 + 14 + 16.8 grams). *Robinson*, 164 F.3d at 1070. The Government also presented evidence that Robinson possessed large sums of cash. For example, Springfield Police Officers Jerry Castles and J.T. Wooldrige testified that they discovered over $3,000.00 in Robinson's car when he was arrested. Thus, the Court found that Robinson should be held accountable for the 32.9 grams of crack which formed the basis for his convictions.

In addition, the Court again found that Robinson should be held accountable for the 56.7 grams of crack attributed to him by David Alton and the 54 grams of crack attributed to him by Michael Smith. *Id.* The Court believed that Alton's and Smith's statements bore a "sufficient indicia of reliability to support its probable accuracy." *United States v. Taylor*, 72 F.3d 533, 543 (7th Cir. 1995). Alton's and Smith's statements that Robinson dealt in large quantities of crack cocaine in Springfield, Illinois, were supported by the evidence presented at trial and by the evidence presented at his re-sentencing hearing. For example, David Alton told the Government that Robinson would occasionally weigh crack cocaine on a Deering brand balance scale; law enforcement officers recovered this type of scale from Robinson's vehicle on November 12, 1996. Accordingly, the

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6. The Court found all three witnesses to be credible.

Court finds that Robinson should be held accountable for 143.6 grams of crack (*i.e.*, 32.9 from the trial + 56.7 from Alton + 54 from Smith).

The remaining 356.4 plus grams of crack for which the Court held Robinson responsible were attributed to him by the testimony of his girlfriend Stephanie Whitehead and his suppliers Tory Clay and Scott Allen. At the re-sentencing hearing, Whitehead testified that she was Robinson's girlfriend from June 1996 until December 1996. During this time period, Robinson supplied her with crack; he also paid for hotel rooms in Springfield, Illinois, which they shared. Whitehead testified that Robinson's drug dealing was "his business," that he never had a legitimate job (although she observed him with large sums of cash),[7] and that Clay and Allen were his drug suppliers. She also claimed that Robinson always converted the powder cocaine which he received from Clay and Allen into crack and that she watched him convert the powder cocaine into crack using a microwave and baking soda.

In addition, Whitehead asserted that Robinson sent her to Cleveland, Ohio, on July 29, 1996, and to Los Angeles, California, in the fall of 1996 to obtain drugs. Finally, Whitehead testified that between June 1996 and December 1996, Robinson obtained cocaine from Allen on 100 occasions and that on each of those occasions he received between one and three ounces of cocaine.

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7. Whitehead observed Robinson with approximately $15,000.00 on one occasion.

Likewise, Tory Clay (a/k/a "T Money") testified that Robinson dealt in large quantities of crack cocaine.[8] Clay testified that he supplied Robinson with between six and eight kilograms of powder cocaine between late January or early February 1995 until August 1996. Clay also testified that

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8. Prior to Clay's testimony, Robinson made an oral motion to strike Clay as a witness because attorney Jon Gray Noll had represented both Clay and him. Robinson argued that because attorney Noll had represented both, a conflict of interest existed which precluded Clay from offering testimony against him. Although Robinson, through his attorney, asserted that attorney Noll knew of Clay's cooperation against him, Clay denied, while under oath, that there was any cooperation discussed between he and attorney Noll after Jon Gray Noll became his attorney. Moreover, both sides seemed to agree that attorney Noll was unaware that Clay and Robinson knew each other. *See United States v. Hopkins*, 43 F.3d 1116, 1119 (6th Cir. 1995) (a conflict is hypothetical when an attorney does not even know of a potential conflict). Finally, although the Court possessed the authority to excluded Clay's testimony, the Court did not believe that the exclusion of Clay's testimony would be a proper remedy under the circumstances. *See United States v. Messino*, 181 F.3d 826, 830 (7th Cir. 1999) (holding that a district court has the discretion to exclude evidence to remedy a conflict of interest on "rare occasions"). Robinson was convicted on December 4, 1997, and Clay did not retain attorney Noll until April or May of 1998. Clay testified that there was never any cooperation discussed between attorney Noll and himself after he retained attorney Noll to represent him. Clay also stated that once attorney Noll learned that Clay was to testify in Robinson's re-sentencing hearing, attorney Noll declined to speak with him. The Court did not believe that these circumstances constituted the rare occasion where the Court should exclude a witness with relevant information from testifying based upon a potential conflict of interest. Therefore, the Court denied Robinson's oral motion to prohibit Clay from testifying at the re-sentencing hearing.

although he sold Robinson powder cocaine only, on one occasion in May or June of 1996, he purchased two or three ounces of crack from Robinson while at Earl Bodine's house. Clay claimed to have seen Robinson with large amounts of cash[9] and to have observed him cook powder cocaine into crack while at his brother Mack Robinson's house and while at Rick Carraro's house. Although Clay acknowledged that Robinson smoked crack, he opined that it would have been impossible for Robinson to have consumed all of the drugs supplied to Robinson by him if for no other reason than the cost.[10]

Finally, Scott Allen testified that he supplied Robinson with a minimum of fifteen ounces of cocaine between July 1996 and October 1996. Allen confirmed that Whitehead traveled to Los Angeles, pursuant to Robinson's direction, where she obtained a kilogram of cocaine from Allen's source. Of that kilogram, Robinson purchased six to eight ounces from Allen. Allen asserted that although he was aware that Robinson smoked crack, it would have been impossible for Robinson to have consumed all of the cocaine which Robinson purchased from him because the transactions were too frequent and because Robinson did not have a legitimate job to pay for all of the cocaine which was purchased; therefore, Robinson would have to have sold some of the cocaine in order to pay for his purchases.

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9. Clay testified that he observed Robinson possess between $10,000.00 and $15,000.00 and four ounces of cocaine on one occasion.

10. Clay would occasionally "front" the cocaine to Robinson. "Fronting" simply means that he would receive the drugs based upon his promise to pay later.

Based upon all of this evidence, the Court found that the Government had met its burden of establishing by a preponderance of the evidence the factors which determined Robinson's base offense level and relevant conduct. *United States v. Garcia*, 66 F.3d 851, 856 (7th Cir. 1995). Although Robinson offered some evidence at the re-sentencing hearing, the Court found that he had not met his burden of proving that the PSR was inaccurate.[11] *United States v. Coonce*, 961 F.2d 1268, 1279-80 (7th Cir. 1992); *United States v. Isirov*, 986 F.2d 183, 185-86 (7th Cir. 1993). Accordingly, the Court found that based upon his drug activity underlying his counts of conviction and his relevant conduct, Robinson should be held accountable for at least 500 grams of crack.

Finally, Robinson had asked the Court for a downward departure pursuant to U.S.S.G. § 5K1.2 and § 5K2.0. Robinson had asserted that he was entitled to a downward departure pursuant to § 5K1.2 because the Government was penalizing him for his refusal to cooperate. Specifically, Robinson alleged that because he refused to cooperate with

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11. At the re-sentencing hearing, Robinson called two witnesses, Dwight Slooter and Myles Galbreth, Jr. Slooter testified that he was Robinson's landlord and his SSI payee. Slooter testified that he never saw any evidence of any drug trafficking in Robinson's apartment and that Robinson never had any money most of the time. However, Slooter's testimony is inconsistent with the evidence that Robinson was able to purchase several ounces of cocaine ranging from $900.00 to $1600.00 an ounce on his approximately $200.00 per month SSI check. Furthermore, although Galbreth testified that Robinson was a heavy drug user, his testimony actually supported the PSR's finding in that he testified that he purchased crack from Robinson and that he witnessed Robinson cook powder cocaine with baking soda and water into crack.

the Government, the Government provided a plethora of law enforcement reports to the United States Probation Office which unfairly attributed large drug amounts to him. Moreover, Robinson asserted that he was entitled to a downward departure pursuant to § 5K2.0 because his case is so unusual that if fell outside of the heartland of cases within the sentencing guidelines. Robinson claimed that this is so because his criminal history is not extensive enough to warrant such an extended period of incarceration, because the career criminal enhancement overstated his criminal history, because during his incarceration he has made rehabilitative strides including completing educational classes and a drug rehabilitation program, and because his sentence is inherently unfair given his offenses of conviction.

However, before the Court could rule upon Robinson's motion for a downward departure, his counsel moved to withdraw the motion. Upon direct inquiry from the Court, Robinson confirmed that he wished to withdraw his motion for a downward departure. Accordingly, the Court allowed Robinson to withdraw his motion for a downward departure.

III. CONCLUSION

In summary, the Court found that Robinson had a base offense level of 36 because his offenses of conviction and relevant conduct involved at least 500 grams of crack. U.S.S.G. § 2D1.1(c)(2). In addition, the Court found that Robinson should receive eight levels of enhancements[12] —

12. The Seventh Circuit found that this Court "did not err in invoking the gun or role-in-the-offense enhancements." *Robinson*, 164 F.3d at 1071 n. 1.

two for possession of a dangerous weapon (U.S.S.G. § 2D1.1(b)(1)), four for being an organizer or leader of a criminal activity which involved five or more participants (U.S.S.G. § 3B1.1(a)), and two for obstructing justice (U.S.S.G. § 3C1.1) — for a final adjusted offense level of 43.[13] Finally, the Court found that Robinson had a criminal history category of VI because he is a career offender. U.S.S.G. § 4B1.1. Based upon these findings, Robinson had a sentencing guideline range of mandatory life.

However, pursuant to U.S.S.G. § 5G1.1(c)(1), Robinson's sentence could not be greater than the statutorily authorized maximum sentence. Here, the jury found Robinson guilty of all three counts charged in the indictment.[14] Counts 1 and 3 carry a maximum sentence of 40 years of imprisonment per count, and count 2 carries a maximum sentence of 20 years. Pursuant to U.S.S.G. § 5G1.2(d), "[i]f the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment."[15] The Court read U.S.S.G. § 5G1.2(d)'s

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13. Again, U.S.S.G. Chapter 5, Part A, comment, n. 2 provides that "[a]n offense level of more than 43 is to be treated as an offense level of 43."

14. The Seventh Circuit has affirmed Robinson's convictions. *Robinson*, 164 F.3d at 1071.

15. "Total punishment" is defined as the combined length of the sentences and is determined by the adjusted combined offense level. U.S.S.G. § 5G1.2, comment.

language as mandatory (*i.e.*, "shall"), requiring it to impose consecutive sentences as to each count upon which Robinson has been convicted.

Ergo, the Court reimposed the same sentence upon Defendant consisting of 480 months of imprisonment on each of Counts 1 and 3 and 240 months on Count 2, to be served consecutively, for a total of 1,200 months. Upon being discharged from the Bureau of Prisons, Defendant was sentenced to a 5 year term of supervised release on Counts 1 and 3 and to a 3 year term of supervised release on Count 2, to be served concurrently. Defendant was ordered to pay a special assessment of $300.00 immediately. No fine or restitution were ordered. The Court, again, recommended to the Bureau of Prisons that Defendant be placed in a facility with a drug rehabilitation program and as close to Springfield, Illinois, as possible.

ENTER: 7 December, 1999

FOR THE COURT:

s/ Richard Mills
RICHARD MILLS
UNITED STATES DISTRICT JUDGE

APPENDIX C — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DATED AND FILED NOVEMBER 29, 1999

United States District Court
Central District of Illinois

Case Number: 3:97CR30025-001

UNITED STATES OF AMERICA

v.

CHARLES R. ROBINSON, IV

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Howard Feldman
Defendant's Attorney

Date of Original Judgment: 06/01/1998

Reason for Amendment:

☒ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

* * *

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THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1, 2 & 3 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841 (b)(1)(B)	Possession with Intent to Distribute a Controlled Substance	10/27/1996	1
21 U.S.C. § 841 (b)(1)(C)	Distribution of a Controlled Substance	11/12/1996	2
21 U.S.C. § 841 (b)(1)(B)	Possession with Intent to Distribute a Controlled Substance	11/12/1996	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 337-54-3564	11/23/1999 Date of Imposition of Judgment
Defendant's Date of Birth: 02/10/1962	
Defendant's USM No.: 11087-026	s/ Richard Mills Signature of Judicial Officer
Defendant's Residence Address: 509 Avondale Drive Springfield, IL 62704	RICHARD MILLS US DISTRICT JUDGE Name & Title of Judicial Officer
Defendant's Mailing Address: 509 Avondale Drive Springfield, IL 62704	11/29/1999 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 1200 month(s).

This term consists of 480 months on Counts 1 and 3 and 240 months on Count 2 all to run consecutively.

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☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in a facility with drug treatment available as close to Springfield, Illinois as possible.

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

This term consists of 5 years on each of Counts 1 and 3 and 3 years on Count 2 all to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

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For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision — Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

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2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall

permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not own, purchase or possess a firearm, ammunition, or other dangerous weapon.

2. The defendant shall, at the direction of the probation officer, participate in a program for substance abuse treatment/counseling including testing to determine whether he has used controlled substances and/or alcohol. During the entire term of supervision, defendant will abstain from the use of alcohol, all other legally obtainable intoxicants, and all mood-altering substances unless prescribed by a physician. Defendant shall pay for these services as directed by the probation officer.

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3. The defendant shall participate in psychiatric services and/or a program of mental health counseling/treatment as directed by the probation officer and shall take any and all prescribed medications as directed by the treatment providers. Defendant shall pay for these services as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$ 300.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

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The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached order.

Guideline Range Determined by the Court:

Total Offense Level: 43

Criminal History Category: VI

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Imprisonment Range: 480 to 1200 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 25,000.00 to $ 5,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

* * * *

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED JANUARY 12, 1999

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2402

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES R. ROBINSON IV,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 97-30025-001 — **Richard Mills**, *Judge.*

ARGUED NOVEMBER 13, 1998 — DECIDED JANUARY 12, 1999

Before BAUER, RIPPLE, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* Charles Robinson IV raises four issues on this appeal but emphasizes one: He claims the district court assigned too much crack cocaine to him under the relevant conduct calculus of the federal sentencing guidelines and, as a result, the sentence he received is too high. He is right about one thing — his sentence is very high,

as a term of imprisonment of 100 years was ordered. We think there's merit to the issue Robinson stresses, and for that reason we vacate his sentence and remand the case for further proceedings.

Robinson went to trial on a three-count indictment in December of 1997. The indictment charged one count of possession of both cocaine and cocaine base with intent to distribute, one count of possession of only cocaine base with intent to distribute, and one count of simple possession of cocaine base. He was convicted on all three counts.

At sentencing, the district judge appropriately relied on the evidence he heard during the trial and information included in the presentence report prepared by the United States Probation Office in arriving at Robinson's sentencing range under the federal sentencing guidelines. The judge pegged Robinson's base offense level at 38, the absolute top of the ladder for drug offenders under the guidelines. To this finding the judge added 2 points because one of Robinson's underlings (Gina Loonsfoot) carried a firearm while transporting drugs, U.S.S.G. § 2D1.1(b)(1); 4 points because Robinson was an "organizer," etc., of five or more underlings, U.S.S.G. § 3B1.1(a); and 2 points because Robinson obstructed justice, U.S.S.G. § 3C1.1. This brought him to level 46, three grades higher than the maximum level of 43. Level 43, the level that was used, calls for a life sentence across the board without regard to an offender's placement in a criminal history category. Because life is not called for in the statutory penalties for Robinson's counts of conviction — 40, 40, and 20 years are the maximums — those sentences were imposed, and they were ordered to be

served consecutively. Robinson will be "eligible" for release in 2083, when he's 120 years old.

Level 38 is reserved for big-time drug offenders who are involved with huge quantities: more than 30 kilos of heroin, 150 kilos of cocaine, and 30,000 kilos (a whopping 33 tons) of marijuana. A much smaller quantity of cocaine base (crack, as it's called on the street) — 1.5 or more kilos — also drops an offender in level 38.

In putting Robinson in level 38 the district judge converted his cocaine quantities into marijuana using the guidelines' "Drug Equivalency Tables." He did so, appropriately again, because two different drugs — powder and crack cocaine — were involved. Here is how the quantity was determined:

Source	Drug Table	Amount	Marijuana Equivalency
Count 1	Powder cocaine	27.6 grams	5.52 kilos
Count 1	Crack	16.8 grams	336.00 kilos
Count 2	Crack	2.1 grams	42.00 kilos
Count 3	Crack	14.0 grams	280.00 kilos
From David Alton	Crack	56.7 grams	1,134.00 kilos

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From Michael Smith	Crack	54.0 grams	1,080.00 kilos
From Gina Loonsfoot	Crack	5,103.0 grams	102,060.00 kilos
		Total marijuana equivalency:	104,937.52 kilos

Robinson's powder cocaine accounts for a mere .000053 percent of the total so, for simplicity sake, we'll drop it from the picture and concentrate on the crack, which also allows us to ditch, entirely, the equivalency table. Taking it one step at a time, Robinson's crack on his three counts of conviction totals only 32.9 grams (2.1 + 14 + 16.8), or just a tad over an ounce, about the weight of an envelope that can be sent through the mail for the cost of a 32-cent stamp. If this were all the crack chargeable to Robinson, his base offense level would be 28 (20 grams but less than 35). To this amount the judge added 56.7 grams of crack based on statements made by David Alton, which brought Robinson's total to 89.6 grams, a total that puts him in base offense level 32. To this we can add the 54 grams attributed by the judge to the statements of Michael Smith, which brings the total to 143.6 grams, still a level 32 placement which tops out at 150 grams. But now comes the sledgehammer — a massive 5,103 grams attributed to statements made by Ms. Loonsfoot. This figure, 97 percent of Robinson's total relevant conduct, propelled him into level 38, a spot one usually thinks of as being reserved for the kind of big-time drug dealers depicted in "The French Connection."

Appendix D

We review deferentially, looking only for clear error, a district court's calculation of drug quantities under the guidelines. *United States v. McClinton*, 135 F.3d 1178 (7th Cir. 1998). And a sentencing judge can consider a wide range of information in reaching sentencing determinations provided it is reliable or, as we have said, provided it includes "sufficient indicia of reliability to support its probable accuracy." *United States v. Taylor*, 72 F.3d 533, 543 (7th Cir. 1995). While it's not required that a judge hear personally from witnesses under oath at a sentencing hearing about drug quantities, we think it's not a terribly bad idea to do so when the witness is going to provide the basis for, as here, 97 percent of a defendant's relevant conduct. Ms. Loonsfoot, the vehicle that skyrocketed Robinson into level 38, did not testify at the sentencing proceeding or, for that matter, at the trial. Her information came to the judge, untested by cross-examination, through the presentence report. And her statements, considering the gravity of their consequences, give us pause.

Loonsfoot's statements in the presentence report come from information taken from "Illinois State Police Investigative" reports that "summarize interviews" with her. According to the PSR, Loonsfoot said Robinson was "selling one-sixteenth ounce quantities of crack cocaine for $100.00 and one-eighth ounce quantities of crack cocaine for $250.00 or $275.00."

This statement makes no sense at all. While we can accept the proposition that people involved with crack cocaine might not be very bright, we don't believe we can assume they are necessarily stupid, especially in matters of

finance. Why Robinson's customers, if Loonsfoot is to be believed, would pay more money for their drugs as the quantities they purchase goes up defies common sense. And this observation colors our view of Loonsfoot's statements about quantities sold as well.

Based on Loonsfoot's statements, as recounted from the Illinois State Police reports, the probation officer estimated that Robinson was distributing 3 ounces (85.05 grams) of crack a day for 60 days. And this — voila — comes out to 5,103 grams of crack, an astonishing amount considering that the hard evidence — the three counts of conviction — only came up with a grand total of 32.9 grams.

We think, even viewed deferentially, that the Loonsfoot statements fail to establish the kind of "indicia of reliability" upon which a sentencing judge could comfortably rely. For that reason, we think a new and more critical look at Robinson's relevant conduct is required.

In remanding this case for resentencing, we make one final observation. As we previously noted, the district court concluded, with enhancements, that Robinson had a score that would put him in base offense level 46, if that were possible. So Robinson will have to then jettison several points to get below level 43, and he can do so only if he keeps his relevant conduct no higher than level 34, which covers between 150 and 500 grams of crack. If he can limit his relevant conduct to that level (and that's as good as he can get, because his status as a career offender puts him at level 34), the best he can do is a final level of 42. Ordinarily, a 1-level change in a base offense level is fairly insignificant

for the sentencing ranges overlap (e.g., the range for level 24 is 51 to 63 months and for 25 it's 57 to 71 months) all the way up to 42. But the difference between 42 and 43 can be gigantic. It is conceivable here that Robinson, if he can get in level 42, can get a sentence 70 years less than the one he first received. And that potential underscores the importance of a firm "indicia of reliability" in Ms. Loonsfoot's account of Robinson's drug dealing activities.

The judgment of conviction is AFFIRMED[1] and the sentence is VACATED. The case is REMANDED for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

1. Robinson's other issues on appeal are meritless. Having reviewed the record, we conclude that the evidence adduced at his trial was more than sufficient to support the jury's guilty verdicts. And the sentencing judge did not err in invoking the gun or role-in-the-offense enhancements. Finally, the testimony at trial clearly established that Robinson distributed crack, not some less devastating species of cocaine.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION DATED AND FILED JUNE 2, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 97-30025

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES R. ROBINSON, IV,

Defendant.

ORDER

RICHARD MILLS, U.S. District Judge:

This cause is before the Court following Defendant's sentencing hearing.

On December 4, 1997, a jury found Defendant guilty of two counts of possession with intent to distribute cocaine base, "crack," and of one count of distribution of cocaine base, "crack," in violation of 21 U.S.C. § 841. Defendant has raised the following unresolved objections to his Presentence Investigation Report ("PSR"):

Appendix E

OBJECTIONS AND FINDINGS

At the beginning of his sentencing hearing, Defendant argued that the Government had the burden of establishing, by a preponderance of the evidence, the factual allegations contained within the PSR. Defendant asserted that the informants' statements and the police reports tendered by the Government constituted an insufficient basis upon which to support the PSR's relevant conduct section and his base offense level. Defendant claimed that in order for the Court to rely upon the factual allegations contained within the PSR, the Government should call the various informants into open Court and subject them to cross-examination. Only then, Defendant argued, can the Court adequately accept the PSR's allegations and conclusions.

Defendant is correct that the Government has the burden of establishing by a preponderance of the evidence the factors which determine a criminal defendant's base offense level. *United States v. Garcia*, 66 F.3d 851, 856 (7th Cir. 1995). However, Defendant is incorrect in his assertion that the Court may not rely upon the statements made by the Government's informants and upon the police reports tendered by the Government at sentencing. On the contrary, the Seventh Circuit has opined that at sentencing:

> [t]he rules of evidence do not apply and the sentencing judge is free to consider a wide range of evidence, including hearsay. However, a defendant has a due process right to be sentenced on the basis of reliable information, and the relaxed standards at sentencing are somewhat in

> tension with that right. We have resolved this tension by requiring that a defendant have a reasonable opportunity to rebut contested hearsay and that the contested hearsay be reliable. To succeed on a challenge the defendant must show that the information before the court was inaccurate and the court relied upon it.

United States v. Windom, 82 F.3d 742, 747 (7th Cir.) (citations omitted), *vacated on other grounds*, 103 F.3d 523 (7th Cir. 1996); *United States v. Taylor*, 135 F.3d 478, 482 (7th Cir. 1998); *United States v. Edwards*, 115 F.3d 1322, 1326 (7th Cir. 1997).

Here, the Court believes that, through the police reports and the informants' statements, the Government has met its burden of establishing by a preponderance of the evidence the factors which determine Defendant's base offense level and relevant conduct. The burden thus has shifted to Defendant to prove that the PSR was inaccurate. *United States v. Coonce*, 961 F.2d 1268, 1279-80 (7th Cir. 1992); *United States v. Isirov*, 986 F.2d 183, 185-86 (7th Cir. 1993). Accordingly, Defendant testified on his own behalf in support of his objections at the sentencing hearing.

A. *Paragraphs 8 – 23 & 33*

Defendant objected to paragraphs 8 through 23 and 33 which set forth his relevant conduct and his base offense level. Defendant argued that the PSR's findings are not specific as to drug quantities and/or amounts. Moreover, Defendant asserted that the statements of the various

informants upon which these paragraphs are based are unreliable, uncorroborated, untrue, and lack sufficient indicia of reliability to support the PSR's findings. Therefore, Defendant objected to the relevant conduct portion of the PSR and to his base offense level.

However, the Court finds that the statements made by the individuals who cooperated with the Government bear "a sufficient indicia of reliability to support its probable accuracy . . . ." *United States v. Taylor*, 72 F.3d 533, 543 (7th Cir. 1995). First, the informants' statements which they made to law enforcement agents corroborate one another. For example, David Alton told the Government that Defendant would occasionally weigh crack cocaine on a Deering brand balance scale; law enforcement officers recovered this type of scale from Defendant's vehicle on November 12, 1996. Likewise, Gina Loonsfoot indicated that Defendant always carried at least $2,000.00 in cash on his person; when Defendant was arrested, police recovered $7,190.00 in cash from Defendant. Finally, each informant's statements were corroborated by the evidence offered at trial, *i.e.*, that between 1995 and 1996, Defendant dealt extensively in crack cocaine.

Second, the informants provided their statements to the Government pursuant to direct use immunity agreements; thus, the informants had an incentive to be truthful, knowing that if they were not, any statements which they made could be used against them. Third, Defendant's testimony at today's sentencing hearing was incredible. *United States v. Brown*, 136 F.3d 1176, 1184 (7th Cir. 1998); *United States v. McClinton*, 135 F.3d 1178, 1192 (7th Cir. 1998). Defendant's

version of the events which occurred between 1995 and 1996 differ from that of every Government informant. Moreover, as will be explained below, Defendant offered perjured testimony both at his suppression hearing and today. Finally, the Court finds that Defendant's offenses and relevant conduct were the same (*i.e.*, drug dealing) and occurred within a relatively short period of time (*i.e.*, between 1995 and 1996). U.S.S.G. § 1B1.3, n. 9(B). Accordingly, Defendant's objection to paragraphs 8 through 23 and 33 are denied.

B. *Paragraphs 25 – 29 & 38*

Defendant objected to paragraphs 25 through 29 and 38 wherein he received a two level enhancement for obstruction of justice. Defendant argued that each of the PSR's three bases for applying the enhancement are invalid. First, Defendant asserted that in 1996, an Illinois state court found him incompetent to stand trial; therefore, he should not be assessed a two level enhancement for malingering and intentionally giving wrong answers to Dr. Scott Duncan. Second, Defendant argued that he provided truthful testimony at the suppression hearing. Third, Defendant denied threatening Sangamon County Correctional Officer Ben Minor. Therefore, Defendant objected to the enhancement.

Taking the stand, alone, is an insufficient basis to find that a defendant perjured himself because a defendant's testimony may simply be inaccurate due to confusion, mistake, or faulty memory. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). Instead, the Court must determine if Defendant gave perjured testimony as defined in 18 U.S.C.

§ 1621(1) which states that a person commits perjury when testifying, declaring, etc. to facts which he does not believe to be true. *Id.*

Here, the Court believes that Defendant offered testimony at the November 13, 1997 suppression hearing which he knew was not true. Given the overwhelming evidence presented in opposition to Defendant's version of events, his testimony lacks credibility. *United States v. Pedigo*, 12 F.3d 618, 628-29 (7th Cir. 1993). Both the documents and the testimony of the witnesses who testified at the suppression hearing and at trial differed from and conflicted with Defendant's story.

For example, during the suppression hearing, Defendant testified that the $7,190.00 found by law enforcement officers on his person and in his automobile on October 27, 1996, was money returned to him from his mother who had been holding his social security money which he had saved over a two year period. Defendant also testified that his mother had given him well over $10,000.00 over the past two years. However, at trial, Defendant's mother testified that she had not given Defendant any large sums of money. Furthermore, it would have been impossible for Defendant to have saved $7,190.00 from his social security benefits. Defendant received approximately $200.00 per month in social security benefits after paying rent. Thus, at the most, Defendant would have been able to save $4,800.00 from his social security benefits over a two year period.

In addition, at the suppression hearing, Defendant denied negotiating a price for the sale of 2.1 grams of crack cocaine

on November 12, 1996, as charged in the indictment. However, at trial, the Government tendered an audio tape recording of a conversation between Defendant and a confidential source in which Defendant negotiated a price for the sale of 2.1 grams of crack.

Finally, at the suppression hearing, Defendant testified that he had smoked crack in the past. Today, Defendant denied ever smoking crack. Likewise, at the suppression hearing, Defendant testified that the cellular telephone found in his automobile by the police was registered to Kim Wilbourne. Today, Defendant asserted that the telephone was registered to him.

In light of the evidence which conflicted with Defendant's testimony, the Court finds that Defendant's testimony was so unbelievable that not even he could believe that his version of the events were true. *United States v. Sanchez*, 32 F.3d 1002, 1006 (7th Cir. 1994). Therefore, the Court finds that Defendant obstructed justice when he perjured herself in open court during the November 13, 1997 suppression hearing. U.S.S.G. § 3C1.1, cmt. (n.3(b)). Accordingly, Defendant's objection to paragraphs 25 through 29 and 38 are denied.

C. *Paragraph 35*

Defendant objected to paragraph 35 wherein he received a two level enhancement for possession of a dangerous weapon, namely a firearm. Defendant argued that Gina Loonsfoot is an unreliable witness and that her statement that he directed her to carry a gun while transporting cocaine

for him is uncorroborated. Moreover, Defendant asserted that he is non-violent by nature and that there is no evidence that the gun was used in furtherance of any drug activities. Therefore, Defendant objected to the enhancement.

However, contrary to Defendant's assertion, Gina Loonsfoot's statement is corroborated. Stephanie Whitehead testified before a federal grand jury that she had observed Defendant with a 9 millimeter, .357, and .25 caliber handguns, as well as a 12-gauge shotgun. Moreover, David Alton stated that he saw Defendant carry a firearm in a duffel bag or gym bag while Defendant conducted drug transactions. Finally, Springfield Police Officer K. Winslow discovered a loaded gun clip in Defendant's possession during a routine traffic stop on May 28, 1996.

Thus, the Court finds Gina Loonsfoot's statement that Defendant directed her to carry a loaded semi-automatic handgun while she was dealing drugs for him to be credible. Guns are a predominant feature of today's drug business, and Defendant has offered no proof to persuade the Court that he did not order Gina Loonsfoot to carry a loaded handgun while she dealt drugs for him. *United States v. Durrive*, 902 F.2d 1221, 1231 n. 8 (7th Cir. 1990). Accordingly, Defendant's objection to paragraph 35 is denied.

D. *Paragraph 37*

Defendant objected to paragraph 37 wherein he received a four level enhancement for being an organizer or leader of a criminal enterprise involving five or more participants.

Defendant argued that the enhancement is based upon unreliable informants and self-serving police reports. Therefore, Defendant objected to the enhancement.

The Seventh Circuit has held that in order for U.S.S.G. § 3B1.1(a)'s four-point organizer/leader enhancement to apply,

> the defendant must have had control, direct or indirect, over at least four other participants in the offense. When we use the word "control," however, we use it in a broad sense to mean some kind of supervisory or organizational role with respect to those participants, including recruitment of other participants.

United States v. Magana, 118 F.3d 1173, 1203 (7th Cir. 1997); *United States v. Hall*, 109 F.3d 1227, 1234-35 (7th Cir. 1997). As explained above, the cooperating witnesses' statements have a sufficient indicia of reliability to support their probable accuracy. These informants told law enforcement officers that Defendant supervised and directed Gina Loonsfoot, Lisha Barger, Kim Wilburn, Carla (LNU)[1], and Murray (LNU) to distribute crack cocaine, count money, and carry weapons for him. In return, Defendant's subordinates received crack cocaine from him. Accordingly, Defendant's objection to paragraph 37 is denied.

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1. This informant was most likely Carla Brown.

Appendix E

F. *Paragraphs 41, 43 & 95*

Based upon his prior objections, Defendant argued that paragraphs 41, 43 and 95 incorrectly calculate his adjusted offense level and guideline range. However, because the Court has denied Defendant's objections, paragraphs 41, 43 and 95 are correct as written.

G. *Paragraph 42*

Defendant has indicated that because he has received certified copies of his two convictions in Sangamon County cases 88-CF-182 and 87-CF-588, he is withdrawing his objection to paragraph 42.[2, 3]

H. *Paragraphs 45 – 48; 58 – 64; & 66 – 68*

Defendant objected to paragraphs 45 through 48, 58 through 64, and 66 through 68. Defendant argued that these paragraphs are irrelevant, inflammatory, and without factual basis and, therefore, should not be included in the

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2. Defendant, acting *pro se*, has objected to paragraphs 50 and 52 because those cases are currently on appeal. However, the sentences in both cases have expired, and the Court is unaware of an appeal in either case. Nevertheless, the criminal history points are valid pursuant to U.S.S.G. § 4A1.1.

3. As a result of Defendant's two prior convictions in Sangamon County, Illinois, Circuit Court cases Nos. 88-CF-182 and 87-CF-588, he is considered a career offender under U.S.S.G. § 4B1.1(B). A career offender's criminal history category in every case is a Category VI. *Id.*

PSR. However, because Defendant's objections to these paragraphs do not affect sentencing, the Court declines to make a factual finding on those objections pursuant to Federal Rule of Criminal Procedure 32(c)(1).[4]

I. *Paragraph 115*

Defendant objected to paragraph 115 arguing that he is entitled to a downward departure based upon several factors. However, Defendant did not sufficiently explain why he is so entitled. *See United States v. Larkins*, 83 F.3d 162, 168-69 (7th Cir. 1996) (holding that the defendant has the burden of persuading the Court that he is entitled to a downward departure). In any event, the Court finds that Defendant is not entitled to a downward departure for any of the reasons tendered by him, individually or cumulatively. Accordingly, Defendant's objection to paragraph 115 is denied.

J. *Paragraph 22*

Defendant objected to paragraph 22 wherein he received a heightened sentence for distributing crack cocaine. Defendant argued that the Government has failed to prove by a preponderance of the evidence that the cocaine base at issue was "crack" and, therefore, subject to the more stringent guideline levels versus that of powder cocaine.

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4. Because Defendant qualifies as a career offender under U.S.S.G. § 4B1.1(B) and, therefore, has criminal history category of VI, his *pro se* objections to paragraphs 49, 54, and 56 have no affect upon his sentence, and thus, the Court declines to make a factual finding on those objections pursuant to Federal Rule of Criminal Procedure 32(c)(1).

However, the Court finds by a preponderance of the evidence that the drug involved was "crack." First, a jury found Defendant guilty of possessing with intent to distribute and guilty of distributing "crack." It is unreasonable to believe that these were the only times in which Defendant dealt with crack cocaine and that all of his other drug transactions involved only powder cocaine. Second, the Illinois State Police laboratory reports indicate that Defendant possessed and distributed crack cocaine rather than powder cocaine. U.S.S.G. App. C, Vol. I, Amendment 487 to § 2D1.1(c) provides:

> " 'Cocaine base,' for purposes of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and *usually appearing in a lumpy, rocklike form.*

(emphasis added); *see United States v. Benjamin*, 116 F.3d 1204, 1207 (7th Cir. 1997). The laboratory reports describe the substance possessed and distributed by Defendant as a "chunky substance." Thus, the drug's appearance establishes that Defendant distributed crack rather than powder cocaine. Third, the Government has presented an affidavit from Illinois State Police Inspector Chris Bolinger who stated that he inspected the drug which Defendant distributed and that, based upon his 18 years of training and experience, he believes it to be crack cocaine. Fourth, Defendant has offered no evidence (other than his own uncorroborated testimony) in support of his assertion that the drug with which he was involved was powder cocaine rather than crack. *United States*

v. Abdul, 122 F.3d 477, 479-80 (7th Cir. 1997). Accordingly, Defendant's objection to paragraph 22 is denied.

Ergo, Defendant's objections to the Presentence Investigation Report are DENIED. Therefore, Defendant has an adjusted offense level of 43[5] and a criminal history within category VI, yielding a sentencing range of life imprisonment. Nevertheless, pursuant to U.S.S.G. § 5G1.1(c)(1), Defendant's sentence may not be greater than the statutorily authorized maximum sentence. Here, Counts 1 and 3 carry a maximum sentence of 40 years of imprisonment per count; Count 2 carries a maximum sentence of 20 years.

However, pursuant to U.S.S.G. § 5G1.2(d), "[i]f the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment."[6] The Court reads U.S.S.G. § 5G1.2(d)'s language as mandatory (*i.e.*, "shall"), requiring it to impose consecutive sentences as to each Count upon which Defendant has been convicted.

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5. Defendant's adjusted offense level is actually 46. However, according to the sentencing table Chapter 5, Part A, comment n. 2, an offense level of more than 43 is to be treated as an offense level of 43.

6. "Total punishment" is defined as the combined length of the sentences and is determined by the adjusted combined offense level. U.S.S.G. § 5G1.2, comment.

Accordingly, Defendant is sentenced to 480 months of imprisonment on each of Counts 1 and 3 and to 240 months on Count 2, to be served consecutively, for a total of 1,200 months. Upon being discharged from the Bureau of Prisons, Defendant is sentenced to a 5 year term of supervised release on Counts 1 and 3 and to a 3 year term of supervised release on Count 2, to be served concurrently. Defendant is ordered to pay a special assessment of $300.00 immediately. No fine or restitution are ordered. The Court recommends to the Bureau of Prisons that Defendant be placed in a facility with a drug rehabilitation program and as close to Springfield, Illinois, as possible.

ENTER: 2 June, 1998

FOR THE COURT:

s/ Richard Mills
RICHARD MILLS
UNITED STATES DISTRICT
JUDGE

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DATED AND FILED JUNE 2, 1998

United States District Court
Central District of Illinois

Case Number: 3:97CR30025-001

UNITED STATES OF AMERICA

v.

CHARLES R. ROBINSON, IV

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Jon Gray Noll
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1, 2 & 3 after a plea of not guilty.

Appendix F

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841 (b)(1)(B)	Possession with Intent to Distribute a Controlled Substance	10/27/1996	1
21 U.S.C. § 841 (b)(1)(C)	Distribution of a Controlled Substance	11/12/1996	2
21 U.S.C. § 841 (b)(1)(B)	Possession with Intent to Distribute a Controlled Substance	11/12/1996	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix F

Defendant's Soc. Sec. No.: 337-54-3564	06/01/1998 Date of Imposition of Judgment
Defendant's Date of Birth: 02/10/1962	
Defendant's USM No.: 11087-026	s/ Richard Mills Signature of Judicial Officer
Defendant's Residence Address: 509 Avondale Drive Springfield, IL 62704	RICHARD MILLS U.S. DISTRICT JUDGE Name & Title of Judicial Officer
Defendant's Mailing Address: 509 Avondale Drive Springfield, IL 62704	06/02/1998 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 1200 month(s).

This term consists of 480 months on Counts 1 and 3 and 240 months on Count 2 all to run consecutively.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in a facility with drug treatment available as close to Springfield, Illinois as possible.

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

This term consists of 5 years on each of Counts 1 and 3 and 3 years on Count 2 all to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit

to one drug test within 15 days of release from imprisonment and two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision — Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

Appendix F

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not own, purchase or possess a firearm, ammunition, or other dangerous weapon.

2. The defendant shall, at the direction of the probation officer, participate in a program for substance abuse treatment/counseling including testing to determine whether he has used controlled substances and/or alcohol. During the entire term of supervision, defendant will abstain from the use of alcohol, all other legally obtainable intoxicants, and all mood-altering substances unless prescribed by a physician. Defendant shall pay for these services as directed by the probation officer.

3. The defendant shall participate in psychiatric services and/or a program of mental health counseling/treatment as

directed by the probation officer and shall take any and all prescribed medications as directed by the treatment providers. Defendant shall pay for these services as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$ 300.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

Appendix F

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached order.

Guideline Range Determined by the Court:

Total Offense Level: 43

Criminal History Category: VI

Appendix F

Imprisonment Range: 480 to 1200 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 25,000.00 to $ 5,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

* * * *

APPENDIX G — RELEVANT STATUTES

21 U.S.C. §§ 841(a) and (b)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving —

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of —

Appendix G

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become

final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving —

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of —

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years

and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * * *

Supreme Court, U.S.
FILED
OCT 23 2000

(2)

No. 00-287

In the Supreme Court of the United States

CHARLES R. ROBINSON, IV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court erred in sentencing petitioner to 100 years' imprisonment for drug offenses in the absence of jury findings on the quantity of drugs involved in the petitioner's offenses or his relevant conduct.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 215 F.3d 1331 (Table). A prior opinion of the court of appeals (Pet. App. 33a-39a) is reported at 164 F.3d 1068. The opinion of the district court following the first appeal (Pet. App. 7a-22a) is reported at 76 F. Supp. 2d 941. The original opinion of the district court (Pet. App. 40a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2000. The petition for a writ of certiorari was

filed on August 21, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on two counts of possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and one count of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 100 years' imprisonment, to be followed by five years of supervised release. Pet. App. 54a-63a. The court of appeals affirmed petitioner's convictions but vacated his sentence. *Id.* at 33a-39a. On remand, the district court resentenced petitioner to 100 years' imprisonment, to be followed by five years of supervised release. *Id.* at 7a-32a. The court of appeals affirmed. *Id.* at 1a-6a.

1. Petitioner was a distributor of crack cocaine in Springfield, Illinois. On October 27, 1996, police officers found 27.6 grams of powder cocaine and 16.4 grams of crack cocaine in petitioner's car. Petitioner was also carrying 0.4 grams of crack cocaine in his pants pocket. Presentence Investigation Report (PSR) 6-7. On November 12, 1996, a confidential informant purchased 2.1 grams of crack cocaine from petitioner and an associate. PSR 7-8. Later that day, police officers found 14 grams of crack cocaine in a bag that petitioner discarded from his car in an area outside a motel where he had tried to elude the officers. PSR 8-9.

2. A grand jury returned a three-count indictment against petitioner. Count 1 charged that petitioner "possessed a controlled substance, namely approximately 16.8 grams of a mixture and substance containing cocaine base ('crack') and approximately 27.6

grams of a mixture and substance containing cocaine, both being Schedule II controlled substances, with the intent to distribute them" on October 27, 1996; Count 2 charged that he "distributed approximately 2.1 grams of a mixture and substance containing cocaine base ('crack'), a Schedule II controlled substance" on November 12, 1996; and Count 3 charged that he "possessed a controlled substance, namely approximately 14 grams of a mixture and substance containing cocaine base ('crack'), a Schedule II controlled substance, with the intent to distribute it" on November 12, 1996. C.A. App. 22-23. Although the indictment specified the type and amount of narcotics in each count, petitioner did not request an instruction at trial requiring the jury to find the quantity of drugs involved in his offenses, and the court gave no such instruction. The jury found petitioner guilty on all three counts.

At sentencing, the district court determined under the relevant conduct provision of Sentencing Guidelines (Guidelines) § 1B1.3(a)(2) that petitioner was responsible for 5,246.6 grams of crack cocaine and 27.6 grams of cocaine, resulting in a base offense level of 38.[1] Pet. App. 35a-36a; PSR 9, 12. The court found "by a preponderance of the evidence that the drug involved was 'crack.'" Pet. App. 51a. After making other adjustments to the offense level, the court determined that petitioner's Guidelines' range was life imprisonment, based upon a total offense level of 43 and a

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[1] Guidelines § 1B1.3(a)(2) required that petitioner's base offense level be determined on the basis of "all acts and omissions" that "were part of the same course of conduct or common scheme or plan as the offense of conviction."

placement in criminal history category VI. *Id.* at 34a, 52a, 62a; PSR 12-13, 19.

Based on the quantities of drugs involved in the offenses, the district court also determined that the statutory maximum terms of imprisonment were 40 years on Counts 1 and 3 under 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998) and 20 years on Count 2 under 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998). Pet. App. 34a, 52a; PSR 29. Pursuant to Guidelines §§ 5G1.1(c) and 5G1.2(d), the district court sentenced petitioner to consecutive terms of 40 years' imprisonment on Count 1, 20 years' imprisonment on Count 2, and 40 years' imprisonment on Count 3. Pet. App. 34a, 52a, 56a.

2. The court of appeals affirmed petitioner's convictions but vacated his sentence. Pet. App. 33a-39a. The court concluded that the statements of one of petitioner's underlings, Gina Loonsfoot, were not sufficiently reliable to support the district court's inclusion of 5,103 grams of crack cocaine in its determination of petitioner's relevant conduct under Guidelines § 1B1.3(a)(2). Pet. App. 36a-38a. The court found that petitioner's other claims were "meritless," noting that "the testimony at trial clearly established that [petitioner] distributed crack, not some less devastating species of cocaine." *Id.* at 39a n.1. The court accordingly remanded for resentencing.

3. On remand, the district court again sentenced petitioner to 100 years' imprisonment. Pet. App. 7a-32a. Based on the testimony of three witnesses, the court found that petitioner was responsible under the relevant conduct provision of Guidelines § 1B1.3(a)(2) for at least 500 grams of crack cocaine, resulting in a base offense level of 36. Pet. App. 14a-19a. After making other adjustments to the offense level, the

court determined that petitioner's Guidelines range was life imprisonment, based a total offense level of 43 and a placement in criminal history category VI. *Id.* at 20a-21a, 31a. Pursuant to Guidelines §§ 5G1.1(c) and 5G1.2(d), the court again sentenced petitioner to consecutive statutory maximum terms of 40 years' imprisonment on Count 1, 20 years' imprisonment on Count 2, and 40 years' imprisonment on Count 3. Pet. App. 21a-22a, 25a.

4. The court of appeals affirmed. Pet. App. 1a-6a. It concluded that the district court's calculation of the quantity of drugs included in petitioner's relevant conduct was not clearly erroneous. *Id.* at 4a-5a. The court also decided that "at the resentencing proceeding the district court properly refused to reconsider issues involving the enhancements [to petitioner's offense level] * * * as well as the identity of the drug as crack cocaine rather than some other form of cocaine." *Id.* at 6a.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that his sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the district court, rather than the jury, determined the type and quantity of drugs involved in his relevant conduct under the Sentencing Guidelines. In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

a. Contrary to petitioner's contention, there was no error under *Apprendi* in the district court's determination of the type and quantity of drugs for which

petitioner was responsible under the relevant conduct provision of the Sentencing Guidelines. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct *the judge* * * * to determine" type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind.").

Apprendi did not hold otherwise. See *Apprendi*, 120 S. Ct. at 2366 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards* v. *United States*, 523 U.S. at 515). The Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). District courts have the power to "depart from the applicable Guidelines range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the

Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because the sentence determined under the Sentencing Guidelines cannot increase the statutory maximum penalty for a criminal offense, Guidelines § 5G1.1(a); *Edwards* v. *United States*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"), *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See, *e.g.*, *United States* v. *Angle*, No. 96-4662, 2000 WL 1515159, at *10 (4th Cir. Oct. 12, 2000) (after *Apprendi*, "the judge may still determine the amount of drugs by a preponderance of the evidence for the purposes of calculating the offense level and relevant conduct under the United States Sentencing Guidelines"); *United States* v. *Doggett*, No. 99-50380, 2000 WL 1481160, at * 5 (5th Cir. Oct. 6, 2000) ("To the extent that Doggett argues *Apprendi* prohibits the trial court from determining the amount of drugs for relevant conduct purposes under the Sentencing Guidelines, this argument is rejected.").

b. Petitioner mistakenly states (Pet. 6) that his statutory maximum sentences, unlike that of the defendant in *Apprendi*, were "not * * * increased" in this case. Based on its findings that the quantities of drugs involved in the offenses were the amounts charged in the indictment, the district court sentenced petitioner to consecutive statutory maximum terms of 40 years' imprisonment on Count 1, 20 years' imprisonment on Count 2, and 40 years' imprisonment on Count 3.[2] Pet. App. 21a-22a, 25a.

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[2] The district court had statutory authority to run those terms consecutively, for a cumulative term of 100 years' imprisonment. See 18 U.S.C. 3584. The Guidelines also address the circumstances

There was no constitutional error under *Apprendi* in the 20-year sentence imposed under 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998) on Count 2. Section 841(b)(1)(C) authorizes "a term of imprisonment of not more than 20 years" for a defendant who has been found guilty of a drug offense involving *any* quantity of a Schedule II controlled substance. Because petitioner's offense involved cocaine base,[3] a Schedule II controlled substance (see 21 U.S.C. 812(c) (Sch. II(a))), petitioner was subject to a 20-year maximum term on Count 2 under Section 841(b)(1)(C), without regard to the specific quantity of cocaine base involved in the offense.

The same conclusion is not true with respect to petitioner's 40-year sentences on Counts 1 and 3. Those sentences are authorized by 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998), which provides that where the offense involves a particular threshold quantity of drugs—here, five grams or more of cocaine base—the defendant shall be sentenced to "a term of imprisonment which may not be less than 5 years and not more than 40 years[.]" The 40-year sentences on Counts 1 and 3, however, exceed the 20-year statutory maximum term prescribed under Section 841(b)(1)(C) for offenses involving Schedule II controlled substances without a

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under which sentences on multiple counts should be run consecutively to achieve the total punishment determined under the Guidelines. Guidelines § 5G1.2. The constitutionality of a sentence under *Apprendi*, however, turns on whether the sentence on a particular count exceeds the prescribed statutory maximum. 120 S. Ct. at 2354.

[3] Count 2 charged that petitioner distributed 2.1 grams of cocaine base. The district court's instructions on Count 2 required the jury to find that "[petitioner] distributed cocaine base ('crack')" as an element of the offense. Jury Instructions 24.

showing as to quantity.[4] The 40-year sentences on Counts 1 and 3 thus depended on an increase in the statutory maximum term based on the district court's findings at sentencing that the offenses involved more than five grams of cocaine base. Imposition of sentences in excess of 20 years on Counts 1 and 3 on the basis of the drug quantity determinations made by the court was error under this Court's decision in *Apprendi*.

Petitioner, however, did not raise this constitutional claim in the district court, the court of appeals, or this Court. The claim therefore may be reviewed only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Nordby*, No. 99-10191, 2000 WL 1277211, at *6 (9th Cir. Sept. 11, 2000); *United States* v. *Meshack*, 225 F.3d 556, 575 (5th Cir. 2000). The error in imposing 40-year sentences on Counts 1 and 3 based on quantity findings made by the court at sentencing was "plain," in that it was "clear" or "obvious" after the decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"); *United States* v.

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[4] Both cocaine and cocaine base are Schedule II controlled substances. See 21 U.S.C. 812(c) (Sch. II(a)). Count 1 charged that petitioner possessed with intent to distribute 16.8 grams of cocaine base and 27.6 grams of cocaine, and Count 3 charged that petitioner possessed with intent to distribute 14 grams of cocaine base. The district court's instructions on Count 1 and 3 required the jury to find that "[petitioner] knowingly or intentionally possessed a controlled substance, namely cocaine base ('crack') or cocaine" as an element of the offenses. Jury Instructions 21. The district court also instructed the jury that "[t]he government need not prove the amount of controlled substance involved in any count charged in the indictment." *Id.* at 25.

Nordby, 2000 WL 1277211, at *6. A showing that the district court committed "plain error" in sentencing petitioner will not entitle him to relief, however, unless he can also demonstrate both that the error "affect[ed] substantial rights" and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). Under the circumstances, it would be appropriate to allow petitioner an opportunity to make the requisite showings to the court of appeals in the first instance.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000).

Respectfully submitted.

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OCTOBER 2000